Filed 11/6/12 Muhumuza v. SunTrust Mortgage CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANIEL MUHUMUZA et al., Plaintiffs and Appellants, v. SUNTRUST MORTGAGE, INC., Defendant and Respondent.	B236267 (Los Angeles County Super. Ct. No. VC058832)

APPEAL from an order of the Superior Court of Los Angeles, Yvonne T. Sanchez, Judge. Affirmed.

Brookstone Law, Vito Torchia, Jr., Deron Colby and Sasan Behnood for Plaintiffs and Appellants.

Akerman Senterfitt, Bryan M. Leifer and Katalina Baumann for Defendant and Respondent.

In the underlying action, appellants Daniel Muhumuza and Catherine Arinaitwe asserted claims against respondent SunTrust Mortgage, Inc. (SunTrust) for wrongful foreclosure, unfair business practices, and injunctive relief. Their claims were predicated on allegations that SunTrust initiated a defective nonjudicial foreclosure proceeding regarding a property they own. After sustaining SunTrust's demurrer to appellants' claims without leave to amend, the trial court entered a judgment of dismissal in favor of SunTrust. We conclude that appellants' complaint states no claim against SunTrust, and therefore affirm.

FACTS

Appellants' complaint alleges the following facts: In April 2007, Maria Rivas and Jose Chavez (borrowers) executed a $892,500 promissory note in favor of SunTrust. The note was secured by a recorded deed of trust regarding a property in Downey (the 2007 trust deed). The deed identified the borrowers as the trustors, Jackie Miller as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary.

In October 2007, appellants entered into an agreement with the borrowers regarding the note. Under the agreement, appellants were to make the payments owed under the note to the borrowers, who were to forward them to SunTrust. In addition, appellants and the borrowers executed a grant deed under which appellants obtained "an undivided, full interest" in the Downey property. The deed was recorded in November 2007.

In August 2008, after making the required payments to the borrowers, appellants learned that the borrowers had not forwarded the funds to SunTrust. With the borrowers' authorization, appellants contacted SunTrust and attempted to negotiate a loan modification agreement. In March 2009, SunTrust offered a loan

modification that appellants and the borrowers accepted. The modification agreement was recorded in November 2009. SunTrust accepted a "good faith" payment from appellants under the modification agreement, as well as their further payments.

On or about January 21, 2011, MTC Financial, Inc., dba Trustee Corps (MTC) recorded a notice of default. Later, in April 2011, MERS recorded an assignment transferring its interest in the borrowers' 2007 trust deed to SunTrust. On or about May 5, 2011, MTC recorded a notice of trustee's sale setting the sale for May 31, 2011.

RELEVANT PROCEDURAL BACKGROUND

On May 25, 2011, appellants initiated the underlying action. Their complaint contains claims against the borrowers for breach of contract and breach of the implied covenant of good faith and fair dealing. Furthermore, it contains claims against SunTrust, Miller, MERS, MTC, and the borrowers for negligent and willful wrongful foreclosure, violations of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and injunctive relief. In connection with the wrongful foreclosure claims, the complaint alleges that SunTrust and the other defendants breached statutory duties owed to appellants as third party beneficiaries of the agreements between SunTrust and the borrowers, or duties owed to them under the common law. In connection with the claim under the UCL, the complaint alleges that SunTrust and the other defendants moved forward with the sale knowing they had no right to conduct it. The complaint seeks compensatory damages and other relief, including a permanent injunction against the foreclosure sale, which threatens to "displace [appellants] from their home."

After the trial court issued a temporary restraining order barring the sale, the defendants agreed to postpone the sale. On September 7, 2011, after the trial court sustained SunTrust's demurrer to the complaint without leave to amend, SunTrust was dismissed from the action. This appeal followed.

DISCUSSION

Appellants contend the trial court erred in determining that their claims against SunTrust fail as a matter of law. For the reasons explained below, we disagree.

A. *Standards of Review*

"Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de novo to determine whether . . . [the] complaint alleges facts sufficient to state a cause of action under any legal theory, [citation], or in other words, to determine whether . . . the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879 (*Cantu*).) "Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether . . . the plaintiff could amend the complaint to state a cause of action. [Citation.]" (*Id.* at p. 879, fn. 9.)

Under the first standard of review, "we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may

disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]" (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) Furthermore, "[t]he fact we examine the complaint de novo does not mean that plaintiffs need only tender the complaint and hope we can discern a cause of action. It is plaintiffs' burden to show . . . that the demurrer was sustained erroneously . . . ." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.) We will affirm the trial court's ruling if a proper ground exists for sustaining the demurrer, regardless of whether the trial court relied on an improper ground or respondents asserted the proper ground before the trial court. (*Cantu*, *supra*, 4 Cal.App.4th at p. 880, fn. 10.)

Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. (*Cantu*, *supra*, 4 Cal.App.4th at p. 890.) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Ibid*.)

B. *Judicial Notice*

At the outset, we clarify the extent to which our inquiry relies on facts subject to judicial notice. In the context of a demurrer, "[t]he complaint should be read as containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary.'" (*Cantu*, *supra*, 4 Cal.App.4th at p. 877, quoting *Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20, 23.) Furthermore, an appellate court may take judicial notice of facts not subject to judicial notice by the trial court. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743; *Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592.) Here, at SunTrust's request, the trial court took judicial notice of four recorded

documents, namely, the 2007 trust deed, the loan modification agreement, the notice of default, and the notice of trustee's sale. In addition, we have granted SunTrust's motion on appeal for judicial notice of certain court records and a recorded substitution of trustee dated May 5, 2011.

As the complaint alleges that appellants were third party beneficiaries of the 2007 trust deed and the loan modification agreement, the trial court properly took judicial notice of these two documents. Generally, "[t]hird party beneficiary status is a matter of contract interpretation. [Citation.] For that reason, the contract must be set out in the pleadings: 'A plaintiff must plead a contract which was made expressly for his benefit and one in which it clearly appears that he was a beneficiary.'" (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1138, quoting *Luis v. Orcutt Town Water Co.* (1962) 204 Cal.App.2d 433, 441.) Accordingly, in assessing a demurrer challenging the plaintiff's purported third party beneficiary status, a court may take judicial notice of the relevant contracts when, as here, they are neither attached to the complaint nor adequately described within it. (111 Cal.App.4th at p. 1138.)

Judicial notice of the recorded instruments and court records is also proper, albeit for different and limited purposes. Generally, a matter is subject to judicial notice only if it is "reasonably beyond dispute." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113.) Thus, in ruling on a demurrer, a trial court may properly take judicial notice of matters only when "'there is not or cannot be a factual dispute'" regarding them. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375, quoting *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) For this reason, a court addressing a demurrer will not take judicial notice of the truth of factual statements contained

within documents, even though the documents themselves are properly subject to judicial notice. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.) Nonetheless, under this principle, "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.) As appellants have not challenged the authenticity of the relevant documents, we will take judicial notice of the documents for those purposes. However, to the extent the truth of any factual statements in the documents is subject to dispute, we will not take judicial notice that such statements are true.

C. *Nonjudicial Foreclosures*

Appellants' claims against SunTrust rely on alleged defects in the nonjudicial foreclosure proceedings, rather than on any allegation that SunTrust wrongfully initiated the foreclosure sale in the absence of a default on the borrowers' loan. Although the complaint does not specifically allege whether the borrowers' loan was in default when the foreclosure proceedings began, appellants have maintained in opposition to the demurrer and on appeal that their claims against SunTrust do not hinge on the absence of a default.[1] Instead, the complaint identifies purported defects in the notice of default and notice of the trustee's sale.

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[1] We may treat these concessions as judicial admissions for purposes of assessing the sufficiency of the complaints. (*Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 560-562.)

Appellants' claims of defects in the notices rely on the statutes governing nonjudicial foreclosures. As elaborated below (see pt. D., *post*), the 2007 trust deed refers to SunTrust's power of sale and contains provisions related to a nonjudicial foreclosure sale. Although powers of sale are contractual in nature (*Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 277-279), their exercise is regulated by a statutory scheme found in the Civil Code (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 334).[2] The operation of the scheme can be summarized as follows: "When the trustor defaults on the debt secured by the deed of trust, the beneficiary may declare a default and make a demand on the trustee to commence foreclosure. [Citation.] . . . Generally speaking, the statutory, nonjudicial foreclosure procedure begins with the recording of a notice of default by the trustee. (§ 2924, subd. (a)(1).) After the expiration of not less than three months, the trustee must publish, post, and mail a notice of sale at least 20 days before the sale, and must also record the notice of sale . . . (§§ 2924, subd. (a)(1), (2), (3), 2924f, subd. (b)(1) . . . .) The sale and any postponement are governed by section 2924g. [Citations]." (*Id.* at pp. 334-335, fn. omitted.)

D. *Wrongful Foreclosure Claims*

We begin by examining appellants' claims for negligent and willful wrongful foreclosure. Regarding these claims, the complaint alleges that MTC recorded the notice of default as the trustee of the 2007 trust deed, and later recorded the notice of the trustee's sale. Furthermore, the complaint alleges that SunTrust failed to substitute MTC for Miller as the trustee before the notice of default was recorded. Appellants argue that they have standing to assert claims for wrongful foreclosure as third party beneficiaries of the 2007 trust deed and the

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[2] All further statutory citations are to the Civil Code, unless otherwise indicated.

loan modification agreement; in addition, they argue that the claims are predicated on violations of section 2934a, which addresses the substitution of trustees. For the reasons set forth below, we reject these contentions.

1. *Third Party Beneficiaries*

To the extent the claims rely on appellants' purported status as third party beneficiaries, the claims fail for two reasons. The primary defect in appellants' contention is that under the facts as alleged or subject to judicial notice, appellants are not third party beneficiaries of the 2007 trust deed or the loan modification agreement, insofar as those agreements contain terms concerning foreclosure sales. In addition, we discern no defect in the notice of default and the notice of the trustee's sale.

a. *No Third Party Beneficiary Status Regarding Foreclosure-Related Contract Terms*

Our inquiry into appellants' status as third party beneficiaries follows established principles. Section 1559 provides: "'A contract, made expressly for the benefit of a third person, may be enforced by him [or her] at any time before the parties thereto rescind it.'" Here, "'"'"[e]xpressly[,]' . . . means 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'" [Citations.] "'[A]n intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties.'" [Citation.] Although this means persons only incidentally or remotely benefited by the contract are not entitled to enforce it, it does not mean both of the contracting parties must intend to benefit the third party: Rather, it means the promisor . . . 'must have understood that the promisee . . . had such intent. [Citations.] No

specific manifestation by the promisor of an intent to benefit the third person is required.' [Citations.]" (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 957-958.)

In view of these principles, a party's status as a third party beneficiary must be assessed in light of the contract and the circumstances under which it was negotiated. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233.) Furthermore, because the status is tied to the promisor's understanding of the promisee's intent, nonsignatories to a contract may be third party beneficiaries of certain provisions within the contract, but not the contract as a whole. (*Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 709.) Although the status ordinarily presents a question of fact, the issue can be resolved when the contract and the circumstances surrounding regarding its negotiation are not in dispute. (*Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at p. 1233.)

Here, the facts as alleged in the complaint or subject to judicial notice do not suggest that SunTrust, in negotiating and executing the 2007 trust deed and the loan modification agreement, believed that the borrowers intended to confer foreclosure-related contractual rights on appellants. As noted below (see pt. D.1.b., *post*), the deed contains provisions relevant to the purported defects in the notice of default and notice of the trustee's sale, including a paragraph regarding the substitution of trustees. But because the borrowers executed the deed before they entered into any agreement with appellants, nothing in the complaint shows that appellants were third party beneficiaries of the deed when it was signed and recorded.

Nor do the facts suggest that SunTrust modified the loan with the understanding that the borrowers intended appellants to acquire foreclosure-

related rights. To begin, the modification agreement discloses no such understanding. Only SunTrust and the borrowers executed the modification agreement, which contains no reference to appellants. Nor does the agreement contain any provision reasonably understood to confer foreclosure-related rights on appellants. The agreement, on its face, makes changes exclusively to the time and amount of the monthly loan payments, the interest rate on the loan, and the loan's maturity date, as well as certain duties directly related to these changes. The agreement does state, however, that "[*a*]*ll* the rights and remedies, stipulations, and conditions contained in the [deed] relating to [a] default . . . shall also apply" to a default under the modified payments, and that the modifications do not "*in any way* impair, diminish, or *affect*" SunTrust's remedies under the deed. (Italics added.) The agreement thus contains no evidence that SunTrust believed that the borrowers intended to place appellants in their shoes, for purposes of exercising their foreclosure-related rights under the deed.

The facts surrounding the negotiation of the agreement also disclose no such belief by SunTrust. The complaint alleges the following facts: In October 2008, after obtaining the borrowers' consent, appellants contacted SunTrust, initiated negotiations regarding a modification agreement, and gave SunTrust a copy of their deed regarding the property. SunTrust thus knew that appellants were making the loan payments and "were on [the] title," but raised no objection to these arrangements. Later, in November 2008, SunTrust offered to place appellants on the loan by a simple assumption, but withdrew the offer. Although the borrowers remained on the loan, SunTrust conducted further negotiations in light of financial information provided by appellants and the borrowers. On several occasions, SunTrust's representatives acknowledged that appellants would be "'on the loan'" by acknowledging that appellants would be making the loan

payments and that any modification agreement would be based on appellants' financial information. In March 2009, appellants and the borrowers accepted the loan modification agreement offered by SunTrust.

Although these facts may support the inference that appellants became third party beneficiaries of the borrowers' payment-related rights, as amended in the modification agreement, they do not show that appellants attained this status with respect to the borrowers' foreclosure-related rights under the 2007 trust deed. Nothing suggests that SunTrust agreed to modify the loan with the understanding that the borrowers intended appellants to acquire their foreclosure-related rights. On the contrary, the facts show that appellants and the borrowers negotiated and accepted a modification agreement that expressly made *no* changes in the foreclosure-related provisions of the 2007 trust deed, and reserved to the fullest extent possible SunTrust's rights and remedies regarding foreclosures. Accordingly, appellants cannot be regarded as third party beneficiaries of the borrowers' foreclosure-related contractual rights.

b. *No Defects in the Notices*

Moreover, even were we to consider appellants to be third party beneficiaries of the foreclosure-related provisions of the 2007 trust deed, their claims would fail, as the judicially noticeable facts demonstrate the absence of the purported defects in the notice of default and the notice of the trustees' sale.

i. *Notice of Default*

Regarding the notice of default, the complaint alleges that MTC recorded the notice as the trustee without first having been substituted for Miller as the trustee. However, subdivision (a)(1) of section 2924 provides that "[t]he trustee,

mortgagee, or beneficiary, or any of their authorized agents" may record the notice of default. Here, the notice of default states that MTC was acting as "the original [t]rustee, duly appointed [s]ubstituted [t]rustee, *or* . . . [*a*]*gent for the* [t]rustee or [*b*]*eneficiary*" under the 2007 trust deed; just above the signature line, the notice specifically identifies MTC as "[*a*]*gent for the* [*b*]*eneficiary*," and elsewhere identifies MERS as the beneficiary under the deed. (Italics added.) The deed itself denominates MERS as the beneficiary, and contains the borrowers' express agreement that MERS "(as a nominee for [SunTrust] . . .) has the right[] to exercise . . . the right to foreclose and sell the Property."

Under these circumstances, appellants have failed to state a claim for wrongful foreclosure predicated on the purported defect in the notice of default. In *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151-1152 (*Gomes*), a borrower's loan was secured by a trust deed containing the same provision regarding MERS's right to foreclose. After an agent purportedly acting on behalf of MERS noticed a default of the loan, the borrower asserted claims against MERS and the agent for wrongful initiation of foreclosure proceeding and declaratory relief. After the trial court sustained a demurrer to the claims without leave to amend, the appellate court affirmed, reasoning that under the deed, the borrower agreed that MERS was empowered to initiate foreclosure proceedings. In view of *Gomes*, appellants' claims for wrongful foreclosure fail insofar as they rely on the purported defect in the notice of default.[3]

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[3] Although the complaint alleges that MERS assigned its interest as beneficiary to SunTrust, it alleges that this occurred after the notice of default was recorded.

ii. *Notice of Trustee's Sale*

Regarding the notice of the trustee's sale, the complaint also alleges that MTC recorded the notice without acquiring the status of trustee. Although the statutory scheme governing foreclosure sales permits several parties to record such notices, the notice here states that MTC was acting as the "duly appointed [t]rustee."[4] As explained below, the facts subject to judicial notice establish that SunTrust properly substituted MTC for Miller as trustee.

The 2007 deed of trust contains the following provision regarding the substitution of trustees: "[SunTrust], at its option, may from time to time appoint a successor trustee to any [t]rustee appointed hereunder by an instrument executed and acknowledged by [SunTrust] and recorded . . . . The instrument shall contain the name of the original [l]ender, [t]rustee and [b]orrower, the book and page where this [s]ecurity [i]nstrument is recorded and the name and address of the successor trustee. . . . This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution."

On appeal, we have taken judicial notice of a recorded instrument containing the required statement that purports to substitute MTC for Miller as trustee. The instrument displays the signature of a SunTrust vice-president dated March 28, 2011, and was recorded on May 5, 2011, the date on which MTC executed and recorded the notice of the trustee's sale, according to the copy of the notice in the record. Because a contract-based trustee substitution ordinarily depends solely on the terms of the contract, the instrument operated to substitute MTC for Miller on or before May 5, 2011. (*Dimock v. Emerald Properties* (2000)

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4 Under subdivisions (b) and (b)(4) of section 2924b, the persons authorized to record the notice of the trustee's sale include the trustee, as well as "an agent for the . . . beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee."

81 Cal.App.4th 868, 875.) As the complaint alleges no facts suggesting that the instrument was ineffective, appellants' claims for wrongful foreclosure fail insofar as they rely on the purported defect in the notice of the trustee's sale.

2. *Section 2934a*

Appellants also contend their claims are properly predicated on a violation of the statutes governing nonjudicial foreclosures. In some circumstances, a successor in interest to the trustor's property may assert a wrongful foreclosure claim based on the trustee's or beneficiary's noncompliance with those statutes. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7-8.) Here, appellants argue that SunTrust, in urging or directing MTC to act as trustee, contravened section 2934a, which describes procedures for substituting trustees and states notice requirements for substitutions under the procedures. We disagree.

As explained in *Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 390, "[i]t is well settled that parties to a deed of trust may agree to a form of substitution of trustee other than that provided in section 2934a. [Citation.] [¶] . . . [N]o statute expressly prohibits the waiver of section 2934a. Tellingly, the Legislature has enacted a statute enumerating the statutory provisions incident to foreclosure that are not subject to waiver. (§ 2953.) Section 2934a is not included." In *U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 83-85, the appellate court rejected the plaintiff's contention that a deed of trust improperly contained a procedure for substituting trustees that supplanted the then-effective statutory notice requirements, concluding that the procedure contravened no public policy interest the plaintiff was entitled to assert.

Here, the 2007 trust deed discloses that SunTrust and the borrowers agreed to displace section 2934a, as the provision in the deed regarding the substitution of

trustees states: "This procedure . . . shall govern to the exclusion of all other provisions for substitution." Furthermore, the facts before us establish no violation of a public policy interest pertinent to the statutory notice requirements. The substitution of trustee occurred after the notice of default, and was recorded on the same date as the notice of the trustee's sale. The statutory notice requirements are intended to ensure that interested third parties know the identity of the trustee for purposes of curing a default. (4 Miller & Starr, Cal. Real Estate (3d. ed. 2003) § 10:9, pp. 40-41.) Appellant have never suggested they were unaware of the substituted trustee or were prepared to cure the default (see pt. E., *post*). Under these circumstances, appellants' claims fail insofar as they rely on section 2934a. In sum, because appellants have identified no contractual or statutory basis for their wrongful foreclosure claims, their complaint does not state such a claim.

E. *Remaining Claims*

Appellants' UCL claim and claim for injunctive relief are defective for similar reasons. Generally, the UCL defines "unfair competition" broadly to include "any unlawful, unfair or fraudulent business act or practice . . . ." (Bus. & Prof. Code, § 17200.) Accordingly, to state a claim under the UCL, a plaintiff must "plead[] facts sufficient to show that the defendant's acts constituted an unlawful, unfair, or fraudulent business practice." (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1253.) Because the complaint fails to allege any such misconduct, it states no claim under the UCL. (*Ibid.*)

Finally, the defects in appellants' wrongful foreclosure and UCL claims are fatal to their request for a permanent injunction. (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 647 ["A permanent injunction is merely a remedy for a

proven cause of action. It may not be issued if the underlying cause of action is not established."].) In addition, appellants are ineligible for injunctive relief against a foreclosure sale, as they have not alleged that they tendered the amount due on the loan. (See *Meetz v. Mohr* (1904) 141 Cal. 667, 673 [trial court properly dissolved temporary injunction preventing foreclosure sale when trustor's successor in interest did not tender funds sufficient to cure default on loan].) In sum, appellants' remaining claims also fail as a matter of law.

F. *Leave To Amend*

We turn to whether the trial court properly sustained the demurrer without leave to amend. Although appellants have requested leave to amend before the trial court and on appeal, they have offered no specific amendments to their complaint. We thus discern no abuse of discretion in the trial court's ruling. As explained in *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44, "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]"[5]

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[5] We recognize that appellants' opening brief asserts that after the ruling on the demurrer, they submitted a first amended complaint containing additional allegations regarding their status as third party beneficiaries of the agreements between SunTrust and the borrowers. However, appellants have neither included the first amended complaint in the record nor described the pertinent allegations. Accordingly, they have failed to carry their burden of showing error on appeal. (See *Cantu*, *supra*, 4 Cal.App.4th at p. 890.)

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.